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No. 02-

IN THE

Supreme Court of the United States

DOUGLAS G. SLOAN,

Petitioner,

v.

CARROLL CHRISTY, RAYMOND MORALES,
CITY OF MILLVILLE

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by this petition, where the petitioner had been prosecuted and incarcerated for stalking with no allegations of physical abuse, predatory following, visual proximity or true threats and for conduct solely intended to advance his goal of reconciliation of a relationship the alleged victim had ended precipitously after seven months, are:

1. Whether the court of appeals erred in affirming the district court's grant of summary judgment for civil-rights and malicious prosecution claims in view of the factual conflicts in the record, the court's reliance on movants' statement of facts and the absence of any allegation of conduct that would constitute a criminal offense.

2. In a civil-rights case where petitioner was prosecuted only for speech and travel with no obscenities, libel, fighting words or true threats and no approach within 20 miles, which party has the burden of establishing whether the conduct is constitutionally protected.

3. In evaluating the statements of the criminally accused petitioner for criminal threats and his physical movements for criminal stalking, how is the distinction between constitutionally protected and unprotected behavior to be effected.

4. Whether in defending a civil rights claim under 42 U.S.C. § 1983 a police officer can rely on information not known to him at the time he initiated the prosecution, including testimony published only several months later and the provisions of a statutory amendment occurring only 13 days before the arrest and of which he was unaware.

5. Whether qualified immunity under 42 U.S.C. § 1983 can be granted to a police officer for circumstances applying only to the alleged victim and having nothing to do with the conduct of the criminally accused petitioner.

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Petitioner Douglas G. Sloan, a Canadian citizen, respectfully petitions that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, affirming a district court's summary judgment against Petitioner's claims.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Third Circuit appears as Appendix B. The unpublished opinion of the District Court appears as Appendix C.

STATEMENT OF JURISDICTION

Petitioners' timely petition for rehearing to the Court of Appeals was denied on July 3, 2002, *see* Appendix A. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case requires interpretation and application of the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1981, N.J.S.A. 2C:12-10 (both an "amended" version effective June 20, 1996 and the "superseded" version), and N.J.S.A. 2C:33-4(a) (*See* Appendix D).

STATEMENT OF THE CASE

Petitioner's claim sought damages from the respondents for malicious and retaliatory prosecution, discrimination and civil-rights violations, as a result of criminal charges instigated against him for allegedly stalking Respondent Carroll Christy.

Petitioner was arrested on July 3, 1996 and incarcerated for 48 days, with bond set at $25,000. He was arraigned on July 8 and indicted on August 6, 1996 under N.J.S.A. 2C:12-10 (superseded). The arrest warrant obtained by Respondent Millville Police Officer Ray Morales was not supported by an affidavit of probable cause. The indictment was dismissed on February 14, 1997. The district court permitted motions for summary judgment in this case after but two months of active discovery, ignoring Petitioner's motion for further discovery and the improprieties in Respondents' Material Facts. The district court, accepted Respondents' version of the case in its entirety (not even referencing Petitioner's Statement of Material Facts), *see Azzaro v. Allegheny County*, 110 F.3d 968, 970 (3d Cir. 1997) (summary-judgment opinion to present non-movant's version), and granted summary judgment on grounds of probable cause and/or qualified immunity. The Third Circuit Court of Appeals affirmed, even though Respondents alleged no physical abuse, following or explicit threats and Petitioner had not come within 20 miles of the alleged victim.

New Jersey amended N.J.S.A. 2C:12-10 on June 20, 1996. The amendment *inter alia* broadened the required culpability and dissolved the nexus between conduct and culpability, *see Long v. State*, 931 S.W.2d 285, 293 (Tex. Cr. App. 1996). Morales, was at all times unaware of the "amended" statute. The lower courts permitted him to rely on the amended statute, even for conduct occurring before the amendment, as well as on much testimony never available to him.

THE BASIS FOR JURISDICTION BELOW

Federal jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1332 (diversity of citizenship), 1343 and 1367 and 42 U.S.C. §§ 1981 (selective prosecution for alienage), 1983 (civil rights) and 1985 (conspiracy).

Petitioner's criminal prosecution was dismissed on February 14, 1997. His complaint was filed February 16, 1999 in New Jersey District Court.

REASONS FOR GRANTING THE PETITION

The Material Facts Favoring Petitioner and Related Legal Issues

Between March 17 and 21, 1996, Ms. Christy precipitously broke off an entirely peaceful, seven-month, intimate relationship with Petitioner, after a weekend of extensive love-making, leaving Petitioner confused and emotionally devastated. (All dates for the alleged offense and prosecution are in 1996.) Petitioner did not ever physically abuse Ms. Christy in any way. Petitioner has no record of criminality or substance abuse and has a statistically low probability of violent behavior based on his age (then 55 years), citizenship, occupation (high-school teacher) and education (master's degree). Where abuse is relevant to issue of threats, *United States v. Sovie*, 122 F.3d 122 (2d Cir. 1997), as is the propensity to violence, *State ex rel. C.C.H.*, 2002 S.D. 113 (S. Dak. 2002), a jury could find no predisposition to violence.

Ms. Christy's mixed signals between March 14 and 26, including lovemaking up to but eight hours before she initiated the breakup, gave Petitioner hope for reconciliation if he left a common-law relationship. Ms. Christy began the breakup on March 17 saying that she "could not deal with Carol's pain" (Carol being the Canadian woman he had been living with). She thereafter also said "It's not you, Doug, I trust you" and "Doug, you turn my heart" and kissed him even after initiating the breakup. She further stated in phone conversation with him on March 26 that she "could not be in a relationship with someone who was in another sexual relationship."

Despite the peaceful breakup, Ms. Christy twice, on March 21 and 26, asked Petitioner not to call her. Ms. Christy first uttered her "injunction" in a March 21 phone conversation, made with her permission, when her major complaint was Petitioner's emotionality and crying.

In attempting reconciliation, Petitioner left Ms. Christy a spate of pleading phone messages between March 23 and 25, made at most five phone calls to her office over three months, speaking to her personally only on March 26, when she broke into a message he was leaving with her secretary to accuse him of harassment and infidelity, consensually and politely spoke to her mother once by phone on March 23, wrote Ms. Christy about twelve wholly importuning letters over the next three months and dissolved his other relationship.

On June 24 he had his Canadian solicitor for that dissolution request a meeting with Ms. Christy in New Jersey on or after June 29 to discuss reconciliation. On June 29 he drove to her hometown, Millville, New Jersey. After speaking to her ex-brother-in-law for 45 seconds, he presented himself with a prepared statement to the Millville Police Department to request help in arranging a controlled meeting with Ms. Christy, *see Morissette v. United States*, 342 U.S. 246, 276 (1952) (defendant's frankness and forthrightness generally point to an absence of felonious intent). During his conversation with Respondent Officer Morales, Morales took a telephone complaint from Ms. Christy's ex-sister-in-law, falsely accusing Petitioner of contemporaneously refusing to leave her property whilst he was talking to Morales. Though aware of the transparent falsity of the accusation, Morales accused Petitioner of stalking, and told him to go back to Canada. Morales also falsely and maliciously advised Petitioner, with specific reference to the

terms of N.J.S.A. 2C:12-10 (superseded), that as an alien he had no constitutional rights in the United States and spontaneously and correctly alluded to Ms. Christy's three sons, thus falsifying the district court's *sua sponte* assertion that Morales did not know Ms. Christy (*see* Appendix C, 24a).

Both Ms. Christy and her ex-sister-in-law were personal friends of Bill Herman, the Millville police chief. The ex-sister-in-law had in fact talked to Morales only after asking for Herman. Ms. Christy later on June 29-30 alluded to her relation with the chief by informing Morales that she had spoken personally to him about Petitioner. The district court acknowledged this (Appendix C, 25a) but found no concerted action, in conflict with *Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987), holding that concerted action under § 1985 is found where complainants, by personal friendship with police chiefs, influence police to effect improper arrests.

Later on June 29, at the request of Ms. Christy's son Blake, Morales searched Ms. Christy's property without finding either Petitioner or Ms. Christy. When Ms. Christy returned home after midnight, Morales gave her Petitioner's statement, which outlined intimate details of their last weekend as reason for thinking reconciliation was possible. Blake testified that he had found it to contain overly private details about his mother while Ms. Christy admitted she had been extremely upset about it in 1996 and was still too distressed to discuss it over four years later.

Ms. Christy testified that she feared being kidnapped, particularly on getting the solicitor's June 24 fax, suggesting Petitioner would come to New Jersey on June 29. Contrariwise, however, she left Millville early on June 29 without telling anyone of her destination and returned home alone after midnight to an otherwise deserted home on a large and isolated property. On July 30 she again returned there alone. Further, Ms. Christy's

testimony has been vague and inconsistent as to many relevant dates and circumstances, indicating she only made notes from memory some four months later, despite having been cautioned by Herman in March to keep accurate notes.[1] Morales' police reports did not mention the fear he only later claimed she was in, *see Wagenmann*, 829 F.2d 216 (failure of police report to mention alleged fear is reason to doubt it); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 147 (2000) (Circumstantial evidence discrediting defendant's explanations is probative of intentional discrimination precluding summary judgment). A jury could thus find that Ms. Christy was motivated not by fear but by her affront at Petitioner's social *faux pax* of allowing her relatives and secretaries to discover intimate relationship details.

Where the district court found Ms. Christy's alleged fear to be material (Appendix C, 20a, 26a, 32a) and a jury could find that Ms. Christy lied to the grand jury in this regard, the court erred in dismissing Petitioner's common law action for malicious prosecution, founded in diversity, *Seidel v. Greenberg*, 260 A.2d 863 (N.J. App. 1970).

Early on June 30, Morales and Ms. Christy filed a temporary restraining order against Petitioner.[2] Meanwhile Petitioner had

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1. Though documenting the March 23-25 spate of phone calls to her home, Ms. Christy was unable to say when the calls to her office were made, and variously gave three different versions of the March 26 phone conversation (dated in her only written summary only as "in April"). Her summary dates several relevant incidents as "in March or early April". Further she alleges she typed the summary from notes she destroyed.

2. Respondents did not claim *res judicata* for the family-court decision in their answers to Petitioner's complaint, contrary to Fed. R. Civ. P. 8(c). For the many due process violations in that hearing see Petitioner's petition for a writ of certiorari to this Court, *Sloan v. Christy*, No. 00-1230. *Res judicata* and estoppel do not apply.

left the Millville area, driven to a state park some 25 miles from Ms. Christy's business in North Jersey, and wrote her again. His letters expressed his distress at being accused of stalking, his confusion about whether she initiated the accusation, his continuing devotion and despair, and indicated exactly where he was if she really wanted to have him arrested, though he could not imagine why.

On July 3, Petitioner, not having left the state park, was served the temporary restraining order charging harassment only and, without being released or allowed to show he would abide by the order, was arrested on Morales' warrant. At deposition, Morales alluded to "stories" he had heard but could not identify *any* danger that Plaintiff posed to Ms. Christy, saying only that he didn't think it "normal" for someone to drive all the way from Canada to want to see someone, and present himself to the police with a prepared statement, *see Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979) (State required to demonstrate necessity of punitive action for speech).

On March 17, some hours after Ms. Christy had begun the breakup, Petitioner had promised that he "would never abuse her or hold a grudge but would bawl a lot." At the family-court hearing, she alleged alarm because this allegedly came "out of the blue" and she did not "know why someone would say something like that out of the blue." The lower courts apparently accepted the promise as a threat without any objective grounds whatsoever and despite Petitioner's averral that Ms. Christy had herself referenced previous abuse and that he had just demonstrated his continuing good will by completing a repair on her house. The court also accepted Ms. Christy's allegation that Petitioner had prefaced the promise with a sarcastic introduction even though Petitioner denied such and Ms. Christy offered inconsistent versions

of the preface (Appendix C, 20a). Further Ms. Christy asked him at the time what he meant, and said "Doug, it's not you, I trust you" whilst kissing him after he denied it was threatening. She then said he had caused her too many problems (a subject on which the district court precluded inquiry) and at the end of a half-hour phone call from Petitioner after he had returned home said, "Doug, you turn my heart."

Again in their phone conversation of March 26, Petitioner, distraught after being falsely accused of harassment and sexual infidelity, accused Ms. Christy of cruelty and withdrew his promise not to hold a grudge. At family court, Ms. Christy alleged this to be threatening but in deposition interpreted Petitioner's disclosure of relationship details as its import. The district court emphasized the statement, contrary to holdings that intent for phone calls should be evaluated at dialing, *State v. Wilcox*, 628 A.2d 924, 926 (Vt. 1993); *State v. Allison*, 941 P.2d 1017, 1019 (Or. 1997); *State v. Elder*, 382 So. 2d 687, 691 (Fla. 1980).

Ms. Christy's family-court testimony was not published until October 9, 1996. Nothing in Morales' testimony or reports relates to any specific statement Petitioner made to Ms. Christy. The lower courts permitted Morales to rely on the testimony (as well as on later deposition evidence not possibly known to him in 1996), in conflict with *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (qualified immunity to be based on information the arresting officers possessed); *Orsatti v. New Jersey State Police*, 71 F.3d 480, 483 (3d Cir. 1995) (probable cause requiring "facts and circumstances *within the arresting officer's knowledge*"); *Goka v. Bobbitt*, 862 F.2d 646 (7th Cir. 1988) (genuine issue in defendant's knowledge of relevant facts); *Portland v. Bagley*, 988 F.2d 868, 875 (9th Cir. 1993) (must remand for determination of defendant's knowledge).

The district court accepted as undisputed material fact that *Ms. Christy* "felt she had been quite clear when she terminated the relationship" (Appendix C, 19a) whilst rejecting as material Petitioner's denials relating to her mixed signals, contrary to *Abraham v. Raso*, 183 F.3d 279, 292 (3d Cir. 1999) (Artificial divisions in sequence of events hinder evaluations of objective reasonableness). Petitioner's claim likens Ms. Christy's behavior to entrapment, *cf. Sorrells v. United States*, 287 U.S. 435, 449-51 (1932) (Alleged entrapment activities are relevant to entrapment claim, which if proven takes case out of statute's purview).

Petitioner asks this Court to find that the district court's handling of the facts in this case, sanctioned by the Third Circuit, by itself so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Constitutional Considerations

Petitioner was prosecuted for a spate of telephone messages, one telephone conversation, his importuning letters, coming to the country via car, attending a police station and camping at a state park 25 miles from Ms. Christy's workplace. This behavior implicates the rights of travel, speech and petition.

Constitutionally protected conduct may not serve as probable cause for an offense, *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389, 1406 (2002) (state may not impose criminal penalties on protected speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (States forbidden to punish language not within "narrowly limited classes of speech"); *Street v. New York*, 394 U.S. 576, 582 (1969) (Indictment may not charge protected and unprotected acts as part of one crime); *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997) (Protected speech cannot serve as probable cause).

Petitioner as here addressed the constitutional issue at length but the district court held that Petitioner had not met *his* burden of demonstrating that his speech merited First Amendment protection, relying on *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), an inapposite contract case with no seizure invoking the Fourth Amendment and which has never been cited by this Court in a Fourth-Amendment seizure context. Petitioner submits that the correct rule is that of *Dombrowski v. Pfister*, 380 U.S. 479, 496 (1965), stating that as accusers, the burden was on Respondents to establish that any given expression is constitutionally unprotected, particularly where Respondents actually *aver* that Petitioner was prosecuted for speech and travel. As a practical matter, Petitioner could not be expected to prove a negative for every statement he made. This Court needs to resolve this issue.

Binding New Jersey Law

The district court found probable cause for harassment and stalking contrary to authoritative decisions of the New Jersey Supreme and appellate courts construing state law that are binding on federal courts, *Winters v. New York*, 333 U.S. 507, 514 (1948).

Where the district court accepted that Petitioner was indicted under the superseded statute, it erred in finding his indictment deficient for his "post-amendment arrest" and thereby relying on the broader amended statute (Appendix C, 11a), contrary to *State v. Grothmann*, 98 A.2d 291 (N.J. 1953) (state constitutional right to be tried only on charges presented in the indictment); *see also Stirone v. United States*, 361 U.S. 212, 216 (1960) (Only grand jury may broaden indictment). The indictment would not have been dismissed if there was probable cause under the superseded statute, where the amendment allows no new defenses.

New Jersey holds that harsh words, even face-to-face, do not engender reasonable fear, *State v. Perry*, 590 A.2d 624, 640 (N.J. 1991) and that "ill-will" and "unfriendly feelings" are too vague for criminal liability, *State v. Mortimer*, 641 A.2d 257, 265 (N.J. 1994); *see also State v. Burgess*, 357 A.2d 62, 64 (N.J. App. 1976) (Vexatiousness and irritability by themselves not probative of propensity to violence). Contrariwise, the lower courts found that the taking back of a promise not to hold a grudge, under the duress of being accused of harassment and infidelity, is harsh enough to engender reasonable fear.

In *State v. Hoffman*, 149 N.J. 564, 583 (N.J. 1997), New Jersey interpreted N.J.S.A. 2C:33-4(a) to conform to well-known constitutional principles and held that it encompassed only those types of communications that also are invasive of the recipient's privacy. Speech, it held, that does not invade one's privacy by its anonymity, offensive coarseness, or extreme inconvenience [as to time of day] does not lose constitutional protection even when annoying. Letters, it held, are not *per se* intrusive of privacy, even when intended to annoy.

None of Petitioner's communications to Ms. Christy were made anonymously, at extremely inconvenient times or contained offensive language. The district court inferred harassment and denied Petitioner's speech constitutional protection contrary to *Hoffman* and citing only the relatively modest number of Petitioner's communications and his failure to accept the alleged termination of the relationship.

The district court emphasized Ms. Christy's request of Petitioner not to call, in conflict with *Horizon Health Ctr. v. Felicissimo*, 638 A.2d 1260 (N.J. 1994) (injunction overbroad where no history of threats, intimidation or assault); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 766 (1994) (injunction

to issue only if defendant has or imminently will violate law); *Cox v. Louisiana*, 85 S. Ct. 453, 482 (1965) (Constitutional rights may not be denied simply because of hostility to their exercise); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946) (First Amendment not concerned with conditions under which the listener receives a message).

The application of domestic violence law to pacific relationships has been held to diminish the suffering of true victims of domestic violence and misuse the legislative vehicle which was developed to protect them, *Periano v. Periano*, 654 A.2d 495 (N.J. App. 1995). *See also Montana v. David*, 880 P.2d 1308 (Mont. 1994) (no probable cause for stalking information in [circumstances more culpable than Petitioner's]). Contrariwise, the district court found probable cause for domestic violence in a relationship with not even a hint of physical abuse, one that even Ms. Christy accepted as "passionate, congenial and friendly."

In similar circumstances, a New Jersey appellate court found no domestic violence or evil intent where the plaintiff understood that defendant's purpose was reconciliation and stated: "Surely the law must have some tolerance for a disappointed suitor trying to repair a romantic relationship when his conduct is not violent or abusive or threatening but merely importuning," *Sweeney v. Honachefsky*, 712 A.2d 1274, 1276-77 (N.J. App. 1998). Ms. Christy herself testified that Petitioner's motive was reconciliation.

Petitioner's Travel

Both interstate and intrastate travel are constitutionally protected, *Griffin v. Breckenridge*, 403 U.S. 88, 96 (1971) (right of interstate travel is assertable against private as well as governmental interference); *Chicago v. Morales*, 527 U.S. 41 (1999); *Lutz v. City of York*, (fundamental rights of both

interstate and intrastate travel are implicit in the concept of ordered liberty and subject only to the same time, place and manner restrictions "so firmly entrenched in the jurisprudence of free speech").

The district court found probable cause for unlawful proximity in Petitioner's travel to New Jersey, contrary to *Jones v. Helms*, 452 U.S. 412, 421 (1981) (State may not burden the travel of citizens whose right had not been qualified by otherwise criminal conduct); *United States v. Dellinger*, 472 F.2d 340, 358 (7th Cir. 1972) (element of interstate travel with the specified intent can not be the gravamen of an offense but is simply the element required for federal jurisdiction).

The district court found a second instance of such in Petitioner's travel to a state park in North Jersey, some 25 miles from Ms. Christy's work place, contrary to *Chicago v. Morales*, 119 S. Ct. 1849, 1857 (1999) (right to remove from one place to another according to inclination is protected attribute of liberty) and *Wagenmann*, 829 F.2d 208, finding, in similar circumstances, a civil-rights violation for an arrest for being "present at a public place where [plaintiff] had an *unqualified right* to be." Petitioner was similarly arrested in a state park doing nothing more than walking down a park road to mail a letter to Ms. Christy.

Statutory terms in New Jersey must be strictly construed in favor of the accused, *State v. Sewell*, 603 A.2d 21, 27 (N.J. 1992); *see also United States v. Reese*, 92 U.S. 214, 219 (1875) (condemning penal statutes with double meanings where citizens entertain one and authorities another). The district court could not have been *more loose* in its use of proximity and following[3]

3. There is no significant difference between "following" and "proximity", *State v. Cardell*, 723 A.2d 111, 116 (N.J. App. 1999). The district court accepted Respondents' contention that proximity encompasses *relative* proximity for subjects who come all the way from Canada.

where it so crucially found that "Plaintiff did repeatedly maintain a physical proximity to Christy by following her from his residence in Canada to her hometown of Millville [and] to the area proximate to her employment in Bridgewater" (Appendix C, 32a). Petitioner came to New Jersey on June 29 while Ms. Christy had last made the same trip in March. Trips separated by months in time do not make a "following" in any sense implied by the stalking statutes. For the second instance the court suggested that the proximity of *areas* is equivalent to the required statutory proximity of defendant and victim. Ms. Christy did not even allege that she had preceded Petitioner to Bridgewater.

The usage adopted by the district court is wholly contrary to decisions of this Court in *United States v. St. Anthony Railroad Co.*, 192 U.S. 524 (1904) (lands 20 miles from railroad cannot reasonably be described as in proximity to it); *Cox v. Louisiana*, 379 U.S. 559, 568 (construing "proximity" to mean "within sight and hearing"); *Madsen*, 512 U.S. 776 (300 foot restriction on picketing unconstitutional); *see also Northeast Women's Ctr. v. McMonagle*, 939 F.2d 57 (3d Cir. 1991) (2500 foot restriction presumptively unconstitutional even under egregious circumstances); *Nelson v. Metro North Commuter RR*, 235 F.3d 101 (2d Cir. 2000) (presence within same building not justifying claim); *Tompkins v. Texas*, 501 S.W.2d 132 (Tex. Crim. App. 1973) (separation of 0.75 mile too great to satisfy proximity element). No reasonable police officer could have believed that a separation of 20 miles was within physical or visual proximity.

The state courts of last resort to consider the matter have construed "following" as having an element of pursuit to it, of a "predatory fashion," and with "proximity in space as well as time." *See Alabama v. Randall*, 669 So. 2d 223, 226

(Ala. Cr. App. 1995); *Illinois v. Bailey*, 657 N.E.2d 953 (Ill. 1995); *Kansas v. Bryan*, 910 P.2d 212, 218 (Kan. 1996). The district court found proximity even where Ms. Christy was not in Millville when Petitioner got there and no evidence was adduced that she was in Bridgewater when he was in the state park. The district court perversely accepted the stalking of places as well as people.

The present decisions extended the notion of proximity to relative proximity and non-predatory behavior without a single supporting precedent, in violation of *Marks v. United States*, 430 U.S. 188, 192 (1977) (Unforeseeable *judicial* enlargements of criminal statutes, applied retroactively, violate an accused's right to fair notice); *United States v. Lanier*, 520 U.S. 259 (1997).

Extending "proximity" to include distances of 20 miles incorporates intolerable ambiguity into these statutes (and many other statutes) in all applications, encompassing millions of people in New York City and, in small states, chilling even interstate travel. No one could know when he would risk arbitrary detention. Stalking statutes would chill conduct logically indistinguishable from loitering. The import of "physical proximity" must only approximate that of "visual proximity," allowing for guilt where the actor conceals himself. No reasonable reading can render meaningless the visual aspect by unconstrained physical proximity.

Ms. Christy admits she had never seen or been followed by Petitioner at any time after March 17 or had any indication whatsoever of such. Respondents' common brief for summary judgment acknowledged that Petitioner never came closer to her than twenty-five miles. The finding of probable cause for unlawful following and/or proximity has no basis in fact or in law.

Petitioner's Speech

Petitioner's speech at all times conveyed a "particularized message," primarily of purely importuning requests for reconciliation (but also of confusion, despair and frustration at being unjustly accused of harassment and infidelity). Ms. Christy and the family court clearly understood that reconciliation was the message. His phone calls, letters, trip to New Jersey and statement to the Millville police all conveyed messages of emotional pain and urgency. Such particularized messages merit First-Amendment protection, *Spence v. Washington*, 418 U.S. 405 (1974).

Petitioner referenced studies indicating that many women break off relationships because of doubts about their partner's commitment; that most breakup victims make unwanted communications to their former intimates and that many of these evoke positive responses in those former intimates (as they should if commitment was the problem); that reconciliation is very common; that the frequency of unwanted communications was not predictive of future violence; and that a rejected lover naturally assesses his chances of reconciliation in context of the rejector's entire set of behaviors, both before and after rejection, making the future far from clear.

Other studies indicate that the grief evoked by relationship breakdown is a basic, universal, biological reaction much like that from traumatic death; that a sudden and unexpected relationship breakdown induces severe psychological trauma, the symptoms of which include denial, emotional lability, preoccupation with former intimates and increased risk of death and disease; that the sudden and unexpected dissolution of a romantic relationship can be especially traumatic; that the intensity of grief parallels the intensity of the attachment; that a failure to understand the causes of a breakup may cause obsessive rumination; and that active coping styles are most adaptive for health.

Where Ms. Christy referenced Petitioner's commitment at several points during the breakup, Petitioner's reconciliation speech, after a sudden and unexpected dissolution of an intense attachment, clearly met *Chaplinsky's* "social value" criteria of protected speech, evidencing no criminal predisposition. Except in details his experience is like that which happens to many normal people every day. Petitioner's research indicates that the law as elaborated by the lower courts would have subjected to prosecution and chilled the output of many literary giants, including Shakespeare, Emily Dickinson, Ernest Hemmingway, Charlotte Bronte, Elizabeth Barrett Browning, William Faulkner, Edith Wharton, Gertrude Stein, Pablo Neruda and Sylvia Platt.

Petitioner's persuasive approach to Ms. Christy embodies the fundamental principle underlying the first amendment. In *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), this Court eschewed silence coerced by law: "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." In *Turner Broadcasting System v. FCC*, 114 S. Ct. 2445, 2458 (1994) it stated: "At the heart of the first amendment lies the principle that each person should decide for himself the ideas and beliefs deserving of expression." *See also NAACP v. Button*, 371 U.S. 415, 437 (1963) (free trade in ideas entails opportunity to persuade); Tribe, L., *American Constitutional Law*, 1978:603, 605 (special value of speech is communication in which the participants seek to persuade; there can be no compelling state interest if the harm feared could be averted by a further exchange of ideas); Volokh, E., 144 U. Pa. L. Rev. 2417 (1996) (Supreme Court accepts that restrictions on speech must not prevent people from using speech to persuade).

Ashcroft, 122 S. Ct. 1403, held that the government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts; nor may protected speech be banned as a means to ban unprotected speech. Contrarily,

the district court cited Petitioner's private thoughts at length (Appendix C, 24a, 25a, 30a) apparently to demonstrate that Petitioner knew he was being accused of harassment and/or stalking, in conflict with *Pierson v. Ray*, 386 U.S. 547 (1967) (Subjects have right to engage in protected behavior, even expecting to be arrested, where they did not goad officers and exercised right in peaceful, orderly and inoffensive manner). It also accepted Respondents' contention that the protected behavior of nonviolent former intimates peacefully pleading their cause of reconciliation should be prosecuted to forestall the attempts of real stalkers to terrorize their victims, contrary to, *Police Department v. Mosley*, 408 U.S. 92, 101 (1972) (Undifferentiated fear or apprehension of disturbance does not overcome freedom of expression); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169-71 (1972) (future criminality not a justification for criminal law).

Where there are no allegations of obscenity, profanity, fighting words or defamation in Petitioner's speech, it may not lose its constitutional protection unless there are true threats of physical harm alleged, *see Chaplinsky*, *supra*. Where the district court inferred a reasonable fear of harm, and that harm came from pure speech alone, with no allegations of the related physical conduct that might convert a statement into a threat, a court is to do a threat analysis of the sort mandated by *Watts v. United States*, 394 U.S. 705 (1969). The district court did no such analysis, contrary also to *State v. Rangel*, 977 P.2d 379 (Or. 1999) (construing alarm in stalking statute to require true threat and holding that for speech-based communications, "Only a threat will be sufficient to cause apprehension or fear resulting from the perception of danger").

In *Watts*, this Court reversed a conviction for a contrary-to-fact conditional threat and stated that "a statute such as

this one which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech." *See also NLRB v. McQuaide, Inc.*, 552 F.2d 519 (3d Cir. 1977) (Evaluation of threats should focus on the conduct of the speaker); Lichterman, J.M., "True threats: Evolving mens rea requirements for violations" 22 Card. L. Rev. 1961 (2001) (intent only at issue if statement is threatening on its face).

The definitive treatment of the constitutional question was stated by *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (threat is expression of intention to inflict injury so unequivocal, unconditional and specific as to convincingly express an intention of being imminently carried out). *See United States v. Whiffen*, 121 F.3d 18 (1st Cir. 1997); *People v. Mirmirani*, 636 P.2d 1130, 1135 (Cal. 1981); *State v. Rangel*, *supra*; *State v. Chung*, 862 P.2d 1063, 1072-73 (Haw. 1993).

The Third Circuit, however, among others, appears to have adopted an objective test for the intent element of threat statutes and to have conflated the intent element with the constitutional test, *see United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991); *Lovell v. Poway Unified School Dist.*, 90 F.3d 367 (9th Cir. 1996). Where this approach has been criticized for criminalizing protected behavior, Lichterman, *supra*, the conflict between the circuits requires the intervention of this Court.

The line below which a statement cannot be considered a threat can be discerned in cases holding that a disputed statement is not a threat but is rather constitutionally protected expression, *see Gooding v. Wilson*, 405 U.S. 518 (1972) ("You swore a lie"); *Rankin v. McPherson*, 488 U.S. 378 (1987) ("If they go for [President Reagan] again, I hope

they get him"); *NLRB v. McQuaide*, *supra* ("Next time you won't be so lucky"); *United States v. Landham*, 251 F.3d 1072 (6th Cir. 2001) ("I've done more to you with a Parker 51 than what happened to your father with a goddamm Taurus five-shot."); *United States v. Barcley*, 452 F.2d 930 (8th Cir. 1971) ("You are the first S.O.B. that will go, Sam Sechser will be next."). These cases show there is no threat without an expression of intent to harm. Hostility is not enough.

Both in their testimony and in their common brief for summary judgment, Respondents admit that Petitioner made no threats to and had not physically assaulted Ms. Christy. Nor was conduct alleged that would convert a promise not to harm into a threat. Perversely the district court found reasonable fear without identifying any true threats.

The court erroneously accepted Ms. Christy's interpretation of Petitioner's March 17 promise. Without the prefatory sarcasm she added, Petitioner's statement, "Carroll, I promise I will never abuse you or hold a grudge, but I will bawl a lot," can hardly be interpreted as a true threat, where on its face it is so unambiguously a promise *never* to inflict harm. *See NLRB v. McQuaide* ([even] *ambiguous* statements do not reasonably tend to coerce or intimidate).

Petitioner took back his promise not to hold a grudge during an emotionally charged exchange in the phone call he made to Ms. Christy on March 26. The taking back of a promise contains no expression of intent to do anything whatsoever. Even Ms. Christy interpreted this as promising only vindictive behavior, like his disclosure of intimate information.

Petitioner's references to camping on Ms. Christy's lawn and coming to Bridgewater were nothing more than thoughts expressing no intent at all and did not even allude to physical

harm. The district court accepted Morales's version of the statement, leaving out the word "had" before "camped" to change the sense (Appendix C, 24a). No reasonable officer could believe that Petitioner's statement was anything other than a contrary-to-fact conditional, *see Collins Cobuild English Grammar*, 351:8.35 Collins (1990). *See also Bailey v. Andrews*, 811 F.2d 366, 372 (7th Cir. 1987) (question addressed to police officer protected under first-amendment petition clause); *Wurtz v. Risley*, 719 F.2d 1438 (9th Cir. 1983) (statute penalizing threats of minor infractions overbroad); *State v. Clarke*, 198 N.J. Super. 219, 225 (N.J. App. 1985) (No offense of attempted criminal trespass where dwelling not targeted); *Kamen v. Egan*, 730 A.2d 873, 877 (N.J. App. 1999) (single act of trespass is not domestic violence where no history of threats or violence).

The question of whether statements are "true threats" is a matter of law, and negative judgments require directed verdicts in favor of the defendant, *United States v. Landham*, *supra*; *United States v. Barcley*, *supra*. The summary-judgment inquiry is like that for directed verdicts, *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). Where the district court could not possibly have found an expression of intent to harm it granted summary judgment to the wrong party.

The district court accepted Ms. Christy's wholly unsubstantiated assertions of fear contrary to *Kashani v. INS*, 547 F.2d 376, 379 (7th Cir. 1977) (Reasonable fear criterion demands objective evidence to substantiate asserted fear); *Moghanian v. U.S. Dept. of Justice*, 577 F.2d 141, 142 (9th Cir. 1978) (naked allegations of fear not creditable).

The court withdrew the case from the jury in conflict with *Hagerty v. L & L Marine Service*, 788 F.2d 315, 318 (5th Cir. 1986) (existence, severity and reasonableness of

fear are questions for jury); *Poller v. Columbia Broadcasting Co.*, 368 U.S. 464 (1962) (summary judgment inappropriate where Defendant's state of mind is at issue and the jury might disbelieve him).

Due process, public policy and the rule of law demand that reasonable fear be interpreted similarly in different circumstances. Reasonable fear of bodily harm may justify pleas of self-defense, *State v. Perry*, *supra*. Confessed murderers should not be heard to argue that their crimes were coerced by harsh words not rising to threats of bodily harm.

Petitioner cannot be held criminally responsible for any fear he might have engendered solely because he was a jilted lover. Where the relationship is peaceful and Ms. Christy entered it voluntarily and even encouraged the intensification of his feelings for seven months, being fully aware of the possibility she might devastate him, the fear proscribed under the stalking statute can only refer to any excess of fear over an undifferentiated general fear of former intimates, *see Montana v. David*, 880 P.2d 1308 (Mont. 1994) (distinguishing between apprehension caused by conduct and that by pre-existing strained relationship); *Dellums*, 566 F.2d 179 (Capitol restrictions can only target conduct more disruptive or substantial than normal).

Statutory Considerations

An individual is denied due process if deprived of liberty "on a record lacking any relevant evidence as to a crucial element of the offense charged," *Vachon v. New Hampshire*, 414 U.S. 478 (1974). An indictment may not be returned without probable cause to support *all* the necessary elements of the crime, *United States v. Goldstein*, 502 F.2d 526, 529 (3d Cir. 1974); *Weyant v. Okst*, 101 F.3d 845 (2d Cir. 1996);

United States v. Prentiss, 206 F.3d 960 (10th Cir. 2000). Probable cause must be found for stalking and not just harassment, which supports neither detention nor high bail, *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782 (3d Cir. 2000).

The superseded version of N.J.S.A. 2C:12-10 requires at a minimum that the actor must repeatedly follow the victim. He must also either engage in a "course of [willful and constitutionally unprotected] conduct" or make a credible threat. Further, all this must be done with the specific purpose both of carrying out a threat and of placing that person in reasonable fear of bodily harm; *State v. Saunders*, 302 N.J. Super. 509 (N.J. App. 1997). Petitioner's travel must be analyzed in the context of the following element. His speech must be analyzed for its constitutional protection, whether it is analyzed under the course of conduct (protected conduct specifically exempted) or under the threat element. Without repeated following there can be no probable cause and that conclusion is only confirmed by the absence of true threats or constitutionally unprotected speech and by Petitioner's innocuous purpose.

Under the amended statute a course of conduct can be found in repeated proximity or by repeated threats, that would cause a reasonable person to fear bodily injury. At a minimum this requires that the actor either: (a) maintains a visual or physical proximity at least twice; or (b) communicates a threat at least twice. Further the actions are those that would cause reasonable fear of bodily injury. Where the alleged threat is by speech alone the statute still requires a constitutional threat analysis; *see State v. Cardell*, 318 N J. Super. 175, 185 (N.J. App. 1999) (amended statute does not reach protected expression); *Long*, 931 S.W.2d 295 (exclusion of constitutionally protected activity is implicit in all criminal statutes). The district court found reasonable fear without finding a true threat, thus rendering nugatory the statutory term "threat". Without any real proximity or true threats there is no probable cause.

The district court judgment included Petitioner's travel and communications in a single "course of conduct" which, it concluded, "would have caused a reasonable person in her position to fear bodily injury to herself or a member of her immediate family." (Appendix C, 32a). This is clearly the wording of the amended statute.

The district court applied the broader amended statute to speech that was communicated to Ms. Christy well before June 20, 1996, in violation of ex-post-facto doctrine; *see Carmell v. Texas*, 120 S. Ct. 1620 (2000) (Only the events occurring after statutory amendment establish the elements of the offense); *Marks*, *supra* (*ex-post-facto* right is protected against *judicial* action by Due-Process Clause of Fifth Amendment); *Weaver v. Graham*, 450 U.S. 24 (1981) (criminal law is *ex-post-facto* when applied to events before its enactment and disadvantaging defendant).

Morales was unaware of the amendment at all relevant times. The district court ignored this issue, while the Third Circuit in discussing qualified immunity allowed that Morales' ignorance was "reasonable under the circumstances" (Appendix B, 6a: n.3). This assertion sidesteps the question whether the facts and circumstances within Morales' knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that Petitioner had violated the charged statute, *Hunter v. Bryant*, 502 U.S. 224 (1991).

Morales gave Petitioner the superseded statute, told Petitioner that he was violating it just by coming from Canada, advised him that its exemption did not apply to aliens and alluded to it in his arrest warrant. He did not seek prosecutorial advice about it. Morales should have been held to what he knew and acted upon. *See Anderson*, 483 U.S. 641 (qualified immunity requiring "clearly established law

and the information the arresting officers possessed"); *Orsatti, supra* (probable cause requiring "facts and circumstances *within the arresting officer's knowledge"*).

Petitioner's Discrimination Claim

First, Fourth and Fourteenth Amendment protection extends to aliens legally within the United States and alienage is a suspect classification, giving aliens rights under 42 U.S.C. §§ 1981 and 1983; *Examining Board v. De Otero*, 426 U.S. 572 (1976) (Alienage is a suspect classification under § 1983); *Whren v. United States*, 517 U.S. 806, 813 (1996) (Constitution prohibits selective enforcement of law); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (Restrictions on travel may not be susceptible to abuses of discriminatory application); Bosniak, L, 69 N.Y.U.L. Rev. 1047 (1994) (Outside immigration law, aliens have the same core constitutional rights as citizens).

Morales falsely told Petitioner that as an alien he had no constitutional rights in the United States when the one complaint he had received about Petitioner was patently false. Morales referred to Petitioner's alienage in his arrest report and grand-jury testimony. As stated in Morales' deposition and in their summary judgment brief, Respondents' rationale for the prosecution was that Petitioner had come from *Canada* via car, clearly implicating alienage. A jury could find real malice. No reasonable officer could believe that such discrimination is lawful.

The district court doubly erred in interpreting 42 U.S.C. § 1981 (Appendix C, 39a-40a). Ignoring this Court's holdings that § 1981 protects aliens within the jurisdiction of the United States from discriminatory penalties of every kind, the court took the reference to "white persons" in the statute as an implicit prohibition only against racial discrimination.

Further it held that § 1981's only relevant portion was that related to contract. It thus denied Petitioner's clearly stated alienage claim because he was not non-white and not alleging contract discrimination.

Qualified Immunity

Officer Morales was granted qualified immunity for circumstances outside Petitioner's control: Morales did not know where Petitioner was going while Ms. Christy was living alone on an isolated acreage, working in an insecure office, and had not activated her cell phone and no one knew where she was (Appendix C, 33a-36a), contrary to *Booth v. Maryland*, 482 U.S. 496, 505 (1987) (Culpability depends only on circumstances over which defendant has control); *South Carolina v. Gathers*, 490 U.S. 805 (1989) (personal characteristics of victim irrelevant to culpability); *Hunter*, *supra* (granting qualified immunity only for actions under suspect's control); *McQuaide*, *supra* (Evaluation of threats should focus on the conduct of the speaker); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997) (speaker not liable for statements the recipient finds threatening because of irrational fears or events unknown to the speaker). No reasonable officer could have believed that probable cause existed for Petitioner's prosecution from his inability to contact someone because she had not turned her phone on.

Petitioner had in fact given Morales his car registration before he left the police station and told Ms. Christy where he was in his letters from the park. Morales did not ask Petitioner if he wanted to harm Ms. Christy and dismissed his assertion that he just wanted to speak to her with the response "Now you can talk to her in court." Evidently his only rationale for the prosecution is that an alien had come all the way from Canada to speak to the object of his devotion.

Allegations of real malice may preclude qualified immunity, *Losch v. Borough of Parkesburg*, 736 F.2d 903, 907, 910 (3d Cir. 1984); *Kniebert v. Thomson Newspapers Mich. Inc.*, 129 F.3d 444, 448 (8th Cir. 1997) (direct evidence of discrimination precludes summary judgment). Evidence of improper motive may include expressions by involved officials regarding their state of mind, circumstantial evidence substantially suggesting that plaintiff has been singled out, or the highly unusual nature of the actions taken, *Blue v. Koren*, 72 F.3d 1075, 1083-84 (2d Cir. 1995). The district court erred in declining to interpret Morales' statement about alienage as an indication of real malice (Appendix C, 10a).

Municipal Liability

A failure to train, discipline or control can form the basis for § 1983 municipal liability if the plaintiff can show both contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents by a supervisor and circumstances under which the supervisor's actions or inactions could be found to have communicated a message of approval to the offending subordinate, *Bonenberger v. Plymouth Township*, 132 F.3d 20, 25 (3d Cir. 1997). To hold a city liable for municipal policy or procedure, "scienter-type evidence must have been adduced with respect to a high-level official determined to have final policy-making authority in the areas in question", *Simmons v. Philadelphia*, 947 F.2d 1042, 1063 (3d Cir. 1991). The Millville Police Chief is such an official, with a practice of giving his friends his personal attention. Petitioner was denied the opportunity to discover the details of the claim.

CONCLUSION

The Third Circuit's refusal to defer to binding state law and the decisions of other circuits as to threats underlines the conflict between the circuits, as yet unaddressed by this court, over the nature of a true threat and puts untold numbers of jilted lovers at risk of prosecution solely for attempting reconciliation. The decision licenses officers to arbitrarily arrest for little more that the extremely intense emotions that are built into the human genome to promote family bonds. These emotions must often be promoted by the alleged victims themselves, who may then cut their lover off so precipitously that their emotional devastation leaves them reeling back and forth from hope to despair, unable to objectively assess the chance of reconciliation, which does happen in many cases not objectively any more promising than Petitioner's. Criminalizing communications for the purpose of reconciliation can only encourage the abusive dating practices employed by Ms. Christy and in other cases contribute to the continuing unhappiness of both parties to the relationship. Petitioner finds no stalking convictions of a lover so purely seeking reconciliation. The decision below thus raises an additional question of vital importance which has not yet been addressed by this Court, namely "Where is the bright line between innocent and criminal behavior when one is devastated by the breakup of an emotionally intense personal relationship."

The failure to publish a coherent opinion, incorrectly denying its precedential value, leaves people ignorant of what could subject them to prosecution and the compromising of their chances of forming future relationships. *See County of Los Angeles v. Kling*, 474 U.S. 936 (1985), Stevens, J, (dissenting) (Refusal to publish spawns secret law, prejudices appeals and sidesteps accountability). The populace as a whole deserves to know what police will learn through the grapevine about common societal dilemmas, if only to be able to debate a previously undebated issue while everyone contemplating an intimate relationship deserves a decision in which the issues relating to probable cause and qualified immunity are clearly distinguished.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JULY 3, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-3485

DOUGLAS G. SLOAN,

Appellant

v.

CARROLL CHRISTY; MATHEW CHRISTY; JANE CHRISTY; BLAKE CHRISTY; RAYMOND MORALES; TOWN OF MILLVILLE POLICE DEPARTMENT; TOWN OF MILLVILLE; JOHN AND JANE DOES 1-20

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and ROSENN,* *Circuit Judges*

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* Hon. Max Rosenn, Senior Circuit Judge, as to panel rehearing only.

Appendix A

The petition for rehearing filed by Appellant Douglas G. Sloan, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: JUL 3, 2002

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 4, 2002

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-3485

DOUGLAS G. SLOAN,

Appellant

v.

CARROLL CHRISTY; MATHEW CHRISTY; JANE CHRISTY; BLAKE CHRISTY; RAYMOND MORALES; TOWN OF MILLVILLE POLICE DEPARTMENT; TOWN OF MILLVILLE; JOHN AND JANE DOES 1-20

On Appeal From the United States District Court
For the District of New Jersey
(D.N.J. Civ. No. 99-cv-00688)
District Judge: Honorable Joseph H. Rodriguez

Submitted Under Third Circuit LAR 34.1(a)
May 17, 2002

Before: SLOVITER, AMBRO, AND ROSENN, *CIRCUIT JUDGES*

(Filed: June 4, 2002)

Appendix B

OPINION

PER CURIAM.

Douglas G. Sloan appeals from the District Court's entry of summary judgment in favor of defendants/appellees Carroll Christy ("Christy"), Officer Raymond Morales, and the City of Millville, New Jersey.[1] Sloan also challenges the District Court's discovery rulings and its refusal to permit an amendment to the complaint. For the reasons that follow, we will affirm the District Court's judgment in all respects.

We will assume the parties' familiarity with the background, which is adequately summarized in the District Court's August 14, 2001, Opinion. Briefly, Sloan sought to recover damages based on claims of false arrest, malicious prosecution, a civil rights conspiracy, and violations of his purported rights under the New Jersey Constitution. The District Court entered summary judgment for the defendants, holding that Sloan's arrest by Officer Morales for the offense of stalking his ex-girlfriend Christy was supported by probable cause; Officer Morales is entitled to qualified immunity from suit under 42 U.S.C. § 1983 because he had an objectively reasonable belief in the lawfulness of his conduct; there was no evidence that Christy initiated the proceedings against Sloan with an improper purpose; Christy did not act under color of state law for purposes of a civil rights claim; the City of Millville was entitled to

1. By order entered January 7, 2002, the Clerk granted Sloan's Rule 42(b) motion and dismissed with prejudice defendants/appellees Matthew Christy, Jane Christy, Blake Christy, and the Town of Millville Police Department as parties to this appeal.

summary judgment because there was no evidence of a policy or custom behind the alleged constitutional deprivations Sloan claimed to have suffered; Sloan was not deprived of his First Amendment free-speech rights; Sloan's conspiracy claims under §§ 1981 and 1985(3) were devoid of evidentiary support; and there was no evidence of any conduct on the part of any defendants of a violation of Sloan's rights under the New Jersey Constitution. Sloan timely filed this appeal.[2]

We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over an entry of summary judgment, which (as the District Court fully explained) is appropriate only when "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Having carefully considered the evidence of record as well as the parties' submissions on appeal, we fully agree with the District Court's entry of summary judgment. In particular, we find no triable factual dispute as to whether Officer Morales had probable cause to arrest Sloan for stalking, and Officer Morales is certainly entitled to qualified immunity in any event.[3] Further, there is no evidence that

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2. Sloan also timely filed a motion for reconsideration, which the District Court denied by Order entered October 12, 2001. Sloan filed an amended notice of appeal from the denial of reconsideration. Because the District Court properly entered summary judgment for the defendants, the motion for reconsideration was properly denied.

3. Although Sloan was charged with stalking under a version of N.J.S.A. § 2C:12-10 that had been amended nine days prior to his

(Cont'd)

Christy played any improper role in Sloan's arrest and prosecution, and she was entitled to judgment on all claims as a matter of law. Finally, Sloan offered no relevant evidence to support a claim of municipal liability, and he makes no argument in support of such a claim on this appeal. In short, given the absence of a *material* factual dispute, summary judgment was appropriately entered against Sloan on all counts in the complaint.

We also find no merit in Sloan's assertion that he was "refused adequate discovery." Appellant's Br. at 7-8. Among other things, Sloan complains that he was not allowed to depose Christy about what he believed were her "mixed signals" when she terminated their relationship. The record, however, fully supports the Magistrate Judge's refusal to permit Sloan to question Christy in that regard, as the questioning was not "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

Finally, Sloan (a Canadian citizen) sought to leave to amend his complaint to claim that he was not advised upon arrest of his rights under Article 36 of the Vienna Convention on Consular Relations, and he contends that the Magistrate Judge abused his discretion in denying the amendment. Appellant's Br. at 62. Sloan argued that, had he been so advised,

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(Cont'd)

first encounter with Officer Morales, we agree with the District Court that the evidence of record supports a finding of probable cause under either version of the statute. Moreover, we agree with Officer Morales that his "failure to know of the amendment to the anti-stalking statute was reasonable under the circumstances," and he is entitled to qualified immunity. *See* Br. of Appellee Morales, *et al.*, at 34-36.

he would have contacted the Canadian Consulate for help to "find a competent attorney and have his bail reduced or the charge dismissed much earlier than it was." Appendix Vol. II at 110. We agree, however, with the reasoning of the Magistrate Judge that the proposed amendment would have been futile and was unduly delayed. Appendix Vol. I at 13-15.

We have considered the remaining contentions in Sloan's brief and reply brief, and we find those contentions without merit and in need of no further discussion. For the reasons noted, the District Court's judgment will be affirmed.[4]

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4. Sloan's motion to expand the record is granted; Christy's motions to file portions of the supplemental appendix in minuscript form and to expand the record are granted; and Morales and the City of Millville's motions to expand the record, to file a supplemental appendix, and to file portions of the supplemental appendix in minuscript form are granted.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF NEW JERSEY FILED AUGUST 14, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Hon. Joseph H. Rodriguez

Civil Action No. 99-688

DOUGLAS G. SLOAN,

Plaintiff,

v.

CARROLL CHRISTY, RAYMOND MORALES, CITY OF MILLVILLE POLICE DEPARTMENT, CITY OF MILLVILLE, and JOHN AND JANE DOES 1-20,

Defendants.

OPINION

RODRIGUEZ, District Judge

This matter is before the Court on motions for summary judgment by defendant Carroll Christy and by defendants Raymond Morales, the City of Millville, and the City of Millville Police Department. For the reasons articulated below, the motions will be granted.

Appendix C

BACKGROUND

On February 16, 1999 plaintiff *pro se* and Canadian citizen Douglas G. Sloan filed the complaint in this action alleging that the defendants violated his constitutional rights when they caused plaintiff's arrest, incarceration, and indictment on or about July 3, 1996.

Apparently, plaintiff and defendant Carroll Christy were involved in an amorous relationship from on or about August 17, 1995 until defendant Carroll Christy ended the relationship on or about March 17, 1996. During this time, plaintiff was living with another woman in Canada. Nonetheless, plaintiff and Carroll Christy met on numerous occasions in Canada as well as in the United States. Carroll Christy had invited the plaintiff to New Jersey to spend the weekend of March 14-17, 1996, but on the morning of March 17 she ended the relationship, citing plaintiff's other intimate relationship with the woman in Canada.

From the tenor of the complaint, it seems that plaintiff failed to accept that his relationship with Carroll Christy had ended. He states that he called Carroll Christy on March 21, 1996 and "she claimed that she was breaking off the relationship but thereafter never definitely confirmed that the relationship was terminated." Plaintiff recounts several telephone calls and letters to Carroll Christy that he used to request reconciliation and to promise that he would end the other relationship. Plaintiff also states that he phoned Carroll Christy's office, her mother, her brother, and her business colleague in "attempts to open up alternative channels of communication." When Carroll Christy still did not respond

favorably to plaintiff's efforts, he had his Canadian solicitor send her a fax on June 25, 1996 indicating that he had ended his relationship with the Canadian woman and requesting a meeting. Again, Carroll Christy did not respond.

Plaintiff states that he traveled to Millville, New Jersey and approached Carroll Christy's ex-brother-in-law, Mathew Christy, on June 29, 1996 to further his reconciliation attempts, but left "after being rebuffed."[1] Plaintiff then "presented himself to the Millville Police Station" to express his continuing wish for reconciliation with Carroll Christy and to offer to meet her at the police station "to allay any fears she might have about such a meeting." Defendant Patrolman Ray Morales was assigned to speak with plaintiff but while doing so, Jane Christy, Carroll Christy's ex-sister-in-law, communicated with the Millville Police Department and demanded that plaintiff be arrested for stalking Carroll Christy.[2] At that point, defendant Morales advised plaintiff that he would be arrested for stalking if he did not leave Millville and the State of New Jersey and go back to Canada, leaving Carroll Christy alone. Morales allegedly further advised plaintiff that he did not have any constitutional rights in the United States and therefore could not claim that his actions came within the "constitutionally protected activity" exception to the stalking statute.

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1. Mathew Christy was originally named as a defendant but has been dismissed from the suit pursuant to a Stipulation of Dismissal filed February 6, 2001.

2. Jane Christy was originally named as a defendant but has been dismissed pursuant to a Stipulation of Dismissal filed February 7, 2001.

Later that day, Carroll Christy's son, Blake Christy, expressed concern to Morales about plaintiff's being in the area.[3] The two drove to Carroll Christy's home where they waited for her to return. Plaintiff alleges that Blake Christy and Morales then advised Carroll Christy to process a domestic violence complaint against him, which she did, alleging harassment but no physical abuse.

On July 3, 1996, the Hunterdon County Police served a temporary restraining order on plaintiff, allegedly at the direction of Morales and the Millville Police Department. Plaintiff was arrested on a stalking warrant signed by Morales and allegedly spent the next 48 days in jail on $25,000 bail.

On July 10, 1996, plaintiff was afforded a hearing but alleges he was not represented by counsel and was not permitted to cross-examine Carroll Christy. At that hearing, the temporary restraining order was made permanent. On August 6, 1996, a grand jury indicted plaintiff on a stalking charge after hearing testimony from Morales and Carroll Christy. Plaintiff indicates that during Carroll Christy's testimony, she stated that she initiated communication with the Millville Police Department in late March 1996, and Bill Herman, Chief of Police, started a file on the case against plaintiff at that time. The indictment was dismissed on February 14, 1997, however, because it was framed in terms of New Jersey's stalking statute prior to its June 20, 1996 amendment and therefore was deficient for plaintiff's post-amendment arrest. The Cumberland County Prosecutor's Office did not seek to re-indict plaintiff.

3. Blake Christy was originally named as a defendant but has been dismissed from the suit pursuant to a Stipulation of Dismissal filed February 1, 2001.

Appendix C

Count I of the Complaint alleges that on or about July 3, 1996 defendant Morales falsely, maliciously, and without probable cause swore to an affidavit charging plaintiff with stalking and that the other individual defendants, now just Carroll Christy, initiated or procured the institution of criminal proceedings against plaintiff without probable cause and/or with malice or other improper purpose because the indictment ultimately was dismissed.

Plaintiff states that in attempting to procure character witnesses for his defense to the stalking charge he was forced to relate the circumstances of his arrest and incarceration to friends and relatives, thereby damaging his reputation. He further alleges damages in the form of humiliation and mental anguish as well as costs incurred in defending himself.

Count II states a conspiracy claim against the individual defendants pursuant to 42 U.S.C. § 1981. et seq. Plaintiff claims that the defendants conspired to deprive him of his First Amendment right to free speech, his Fourth and Fourteenth Amendment rights to be free from seizure and incarceration without probable cause, and his Fourteenth Amendment rights to be free from invidious discrimination and/or to be accorded due process. Plaintiff further claims Morales willfully or recklessly deprived plaintiff of his Fourth and First Amendment rights.

Count III alleges that all defendants violated plaintiff's rights under the New Jersey Constitution.

Appendix C

SUMMARY JUDGMENT STANDARD

This court will enter a summary judgment only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if supported by evidence such that a reasonable jury could return a verdict in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. *Id.* In determining whether a genuine issue of material fact exists, the court must view the facts and all reasonable inferences drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Initially, the moving party has the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met this burden, the non-moving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. *Id.* at 324. The non-moving party may not rest upon the mere allegations or denials of its pleading. *Id.*; *Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254, 1258 (D.N.J. 1994). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing

sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

On a motion for summary judgment, the court does not "weigh the evidence and determine the truth of the matter, but [instead] determine[s] whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 242-43. Credibility determinations are the province of the factfinder. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

DISCUSSION

Count One of the Complaint in this matter alleges that "On or about July 3, 1996, defendant Morales falsely, maliciously, and without probable cause, swore to an affidavit charging plaintiff with stalking . . . and plaintiff was thereupon arrested . . . , taken to the Cumberland County Jail and incarcerated there for 48 days until he was released on bail." Defendant Carroll Christy is cited for "initiat[ing] or procur[ing] the institution of criminal proceedings . . . without probable cause and/or with malice or with other improper purpose." Plaintiff also complains, in Count Two, that Morales, Christy, and others willfully or recklessly conspired with each other, in contravention of 42 U.S.C. § 1981, et seq. to violate plaintiff's Fourth and Fourteenth Amendment rights to be free from search and incarceration without probable cause, his First Amendment right to freedom of speech, and his Fourteenth Amendment right "to be free from invidious discrimination and/or to be accorded due

process." Finally, in Count Three, plaintiff simply states that the defendants violated his unspecified "rights under the New Jersey Constitution."

Thus, Count One may be read to state a common law claim against Morales and Christy for false arrest and/or malicious prosecution. Count Two can be read to allege a conspiracy, under 42 U.S.C. § 1985, by Morales, Christy, and others to deprive plaintiff of his First, Fourth, and Fourteenth Amendment rights as well as a claim against Morales brought pursuant to 42 U.S.C. § 1983, for deprivation of plaintiff's First and Fourth Amendment rights. Count Three, because it alleges unspecified violations of plaintiffs rights under the State constitution, may be analyzed along with the alleged federal rights violations.

The defendants have moved for summary judgment on the entirety of the Complaint, on the grounds that (1) plaintiff's claims are time-barred because although his arrest was effected on July 3, 1996, his Complaint was not filed until February 16, 1999; (2) plaintiff did not comply with the notice provisions of the New Jersey Tort Claims Act; (3) probable cause existed to arrest plaintiff for stalking; (4) Morales is entitled to qualified immunity because he reasonably believed probable cause existed to arrest the plaintiff; (5) the Complaint contains no allegations against either the City of Millville or its Police Department; (6) there is no basis for a punitive damage claim; (7) plaintiff cannot challenge that he engaged in a "course of conduct" in violation of the stalking statute because a judge found that he harassed Christy; (8) Christy's private actions taken to seek police involvement are not sufficient to form the basis

of a conspiracy required by the "color of state law" requirement of Section 1983; (9) Section 1981 does not apply to alienage discrimination; and (10) Christy is not a State actor; so there is no viable claim against her under the New Jersey Constitution.

It follows from the allegations of the Complaint and the bases for the instant summary judgment motions, therefore, that this Court must first examine the determination by Morales that plaintiff's arrest should be effectuated.

Count One

Defendant Morales ultimately signed a warrant for the arrest of the plaintiff for the offense of stalking. Under New Jersey law,

> a person is guilty of stalking, a crime of the fourth degree, if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family.

N.J. Stat. Ann. § 2C:12-10 (West Supp. 2000). "Course of conduct" is defined by the statute as: "repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person." *Id.* The former statute defined the crime as: "purposely and repeatedly follow[ing] another person and

engag[ing] in a course of conduct or mak[ing] a credible threat with the intent of annoying or placing that person in reasonable fear of death or bodily injury." N.J. Stat. Ann. § 2C:12-10 (West 1995) (*amended*, effective June 20, 1996). "Course of conduct" had been defined as:

> a knowing and willful course of conduct directed at a specific person, composed of a series of acts over a period of time, however, short, evidencing a continuity of purpose which alarms or annoys that person and which serves no legitimate purpose. The course of conduct must be such as to cause a reasonable person to suffer emotional distress. Constitutionally protected activity is not included within the meaning of "course of conduct."

Id.

To establish a prima facie claim of false arrest, whether under common law or § 1983, the plaintiff must demonstrate, in part, that the defendant lacked probable cause to arrest. In this case, however, rather than a claim for unlawful arrest,[4] plaintiff insists that he has asserted a malicious prosecution claim against Morales arising out of his allegedly unlawful arrest.[5] *See, e.g.*, March 15, 2001 letter from plaintiff to the

4. If plaintiff had maintained any claim for false arrest, the Court would have summarily dismissed it, as a false arrest claim accrues on the date of the arrest, *Montgomery v. DeSimone*, 159 F.3d 120, 126 (3d Cir. 1998), and the instant Complaint was filed over two years after plaintiff's July 3, 1996 apprehension.

5. It appears that plaintiff's Count One sets forth a common law claim, rather than a claim pursuant to § 1983 for malicious (Cont'd)

Court ("even a cursory reading of my complaint must show that it is a claim for malicious prosecution"). Nevertheless, probable cause must still be proved, again, whether the malicious prosecution claim has been brought under common law or § 1983. *See Luthe v. City of Cape May*, 49 F. Supp.2d 380, 392 (D.N.J. 1999). Thus, regardless of the way plaintiff has styled his Complaint, the threshold issue is whether Morales had probable cause to arrest him for stalking, thereby setting his prosecution in motion.

The Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause. U.S. Const., amend. IV. "Probable cause is defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Sharrar v. Felsing*, 128 F.3d 810, 817-18 (3d Cir. 1997) (citations, internal quotations and alterations omitted); *Orsatti v. New Jersey State Police*, 71 F.3d 480, 483 (3d Cir. 1995) (stating that probable cause exists "when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant

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(Cont'd)
prosecution in violation of the Fourth (or First) Amendment, as discussed by a plurality of the Supreme Court in *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (holding "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims") (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Count Two, however, alleges violations of the plaintiff's rights under the First, Fourth, and Fourteenth Amendments. Under either analysis, common law or § 1983, the plaintiff would have to show lack of probable cause.

a reasonable person to believe that an offense has been or is being committed by the person to be arrested"). The determination that an officer had probable cause to arrest an individual is based on whether it was objectively reasonable for the officer to believe, in light of the totality of the circumstances confronting him and without regard to the officer's underlying intent or motivation, that the person arrested committed the charged offense. *Sharrar*, 128 F.3d at 818; *Dowling v. City of Phila.*, 855 F.2d 136, 141 (3d Cir. 1988). Generally, the existence of probable cause to make an arrest is a factual question for the jury unless no genuine issues of material fact or credibility conflicts exist, in which case summary judgment may be appropriate. *Montgomery v. DeSimone*, 159 F.3d 120, 124 (3d Cir. 1998); *Groman v. Township of Manalapan*, 47 F.3d 628 (3d Cir. 1995). Indeed, the Third Circuit has instructed that "a district court may conclude 'that probable cause exists as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding,' and may enter summary judgment accordingly." *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788-89 (3d Cir. 2000) (quoting *Sherwood v. Mulvihill*, 113 F.3d 396, 401 (3d Cir. 1997)).

The material facts and circumstances that precipitated plaintiff's arrest in this case are not disputed. Carroll Christy testified on January 16, 2001 that although she felt she had been quite clear when she terminated the relationship with the plaintiff (Christy Dep., p. 111), he continued to call her to a harassing point. She cataloged four telephone messages on March 22, two on March 23, constant calling on March 24 from 7:30 a.m. to past 9:15 a.m., then two more calls at 5 p.m., and calls beginning at 6:45 a.m. on

March 25; this caused her to change her telephone number. (*Id.* at 109-110.) Ms. Christy also spoke to Bill Herman, as a friend who was also Chief of Police, "to tell him [that she] was frightened and concerned about [plaintiff's] refusing to take no for an answer." (*Id.* at 114.)

During the July 10, 1996 Family Court trial on the restraining order, Carroll Christy testified to the events that led to her filing a complaint against plaintiff because she was in fear that plaintiff would harm her:

> A. On approximately March 17th, I terminated a seven month relationship with Douglas Sloan. In the course of my discussion with him, he said, "Well, don't worry, I will never beat you up and I will never hold a grudge against you." . . . The statement concerned me. I became very fearful of that because he had made the statement about beating me up, that he would in fact harm me.
> Q. What led you to believe that you learned about his behavior over those seven months, what made you believe that, what did you see in those seven months that would lead you to believe that when he said that?
> A. There was nothing specific in his behavior, sir. It was a comment that came out of the blue and it just — I didn't know why somebody would say something like that out of the blue.

(Transcript, pages 4-6.)

Appendix C

A. On March 28th, I changed my telephone number to an unlisted number. In late March he telephoned my 85 year old mother in Maine who he did not know, and he asked her about me and how to get in touch with me, she would not give him any information. He asked for my sister's telephone number, she would not give that to him. In late March or early April, my brother called Mr. Sloan and told him to stop harassing me. He did not stop. . . .
In late March I called Bill Herman, Chief of Police in Millville, and reported the harassment to him and he began a file on the case. I asked him to have my home patrolled because I was afraid that Mr. Sloan would come down and try to find me.

(*Id.* at 7.) Regarding one telephone call to Christy's office, she has revealed:

Q. Okay. After you got on the phone and told him that you did not want to have a relationship with him, you didn't want him to call you anymore, you didn't want him to bother you anymore, you didn't want him to write you letters anymore, what was his response, if anything?
A. He wanted to know if I was jerking him around. He said that — he said remember what I said about not holding a grudge against you? And I said, yes. And he said, well, I take it back. And that scared me to death.
Q. Okay, did you report that to the police?
A. Yes, I did.

Appendix C

> Q. Okay. How many times did you call the police department between March and April to let them know what was going on? Approximately.
> A. I didn't — I think I called [Bill] once and then I saw him on a couple of occasions and spoke to him in person.
> Q. So approximately two to three times?
> A. So I'd say three times.

(*Id.* at 10-11.) She later testified at a deposition for this case that

> what transpired on that phone call terrified me. Because [plaintiff] said to me, 'you're a cruel woman.' [Plaintiff] said to me, 'do you remember what I told you about not holding a grudge, Well, I take it back.' And [plaintiff] said to me — and when he said this to me [his] voice dropped and [he] said, 'don't jerk me around.' And when I got off the phone I felt terrified. I felt that it was an implied threat, [his] way of telling me that [he] was going to get even with me. And I was terrified.

(Christy Dep., p. 138-39.) Testifying in Family Court, she continued:

> A. I subsequently, on June 25th, received a fax from a solicitor in Canada, who Mr. Sloan had used, and she said that he wanted a reconciliation with me and he wanted to come — he wanted me to contact him and he wanted to come to this country and work as a volunteer for the American

Heart Association, which is my company, and would I contact him, and she gave specific dates.
Q. Did you get any phone calls or any contact with Mr. Sloan after that?
A. He contacted a business associate and another American Heart Association Office on June 27th asking about me. And she told him that it was totally inappropriate that he be calling my place of business and she hung up on him.
Q. Okay.
A. Then on June 29th, he came to this country.
Q. Okay.
A. And he came to my ex-brother-in-law's place of business in Millville, Christy Funeral Home, and he spoke with my brother-in-law, Matt, and he asked if Matt would try to find me or one of my children. And Matt, I have a notarized statement from Matt stating what he said which was, "She doesn't want to see you, I suggest that you go back to your own country." Or get out of town or whatever. Then he went to the police station and my understanding is that he give them a three-page statement outlining our relationship for the past seven months. When I got home that night, the police were at my house and they were there because they were concerned — they had to let him go because they were not able to get a hold of me to know from me firsthand that I was very frightened and that I would have signed a complaint at that point. But when they came to my house, they took me back to the police statement and at that time I signed the complaint.

(Transcript, p. 11-13.)

Indeed, the first time that Morales had ever heard of or had contact with the plaintiff or Carroll Christy was June 29, 1996. That day, plaintiff presented himself at the Millville police station and was directed to Morales. Plaintiff informed Morales that he had been involved in a relationship with a Millville woman and presented Morales with a three-page statement, which can be fairly described as bizarre, and which he had prepared outlining intimate details of the relationship. (Exhibit E to Madden Certification.) Importantly, the statement also acknowledged that Carroll Christy had accused plaintiff of harassing her and noted that plaintiff had written Christy perhaps eleven letters, seven of which had been returned. As Morales was reading the statement, he received the telephone call from Jane Christy.

Morales advised plaintiff that he was stalking Carroll Christy by following her to Millville from his home in Canada. (Sloan Dep., 12/28/00, p. 68.) Plaintiff asked Morales what the ramifications would be if he camped out on Christy's front lawn. In plaintiff's own words, "after (Morales) threatened to arrest me for stalking, I asked him what he would have done if I had camped on her front lawn." (*Id.* at 76.) Morales advised that plaintiff's "best bet" would be to leave the area and return to his own country. Morales also provided plaintiff with a copy of New Jersey's stalking law, and plaintiff proceeded to inquire about the exceptions to the statute before leaving the police station.

Morales has testified that he was concerned about the situation after plaintiff left the station, so when Christy's son called the station because no one knew where his mother was at that time, his alarm increased. He met Christy's son

at her home and searched the grounds for a sign of Christy. As it turned out, Christy was unharmed and returned to her residence at approximately 12:55 a.m. When she arrived, her son Blake told her that plaintiff was in Milville and she became very upset. (Morales Dep., 11/14/00, p. 19, 21.) At that time, Morales explained why he was there, that plaintiff was in the area and had come to the station. Again, Morales found that Christy appeared upset. (*Id.* at 47.) She then said that she wanted to file a complaint against plaintiff. (*Id.* at 46.) In the course of doing so, Christy informed Morales that she had had a dating relationship with plaintiff, and that she told him it was over, but that she had been in touch with Bill Herman because plaintiff had been calling her house constantly and began to call her place of employment, that he had been writing her letters and that she even received a letter from his lawyer advising her of open dates so that they could meet. (*Id.* at 50.) Morales assisted Christy in applying for a restraining order, which was granted by a municipal court judge at 3 a.m. (Exhibit M to Madden Certification.)

In the interim, plaintiff had begun to travel north and camped out at a state park approximately twenty miles from Christy's place of employment; this was the only state park he could identify in the vicinity of her place of work. (Sloan Dep., p. 121.) He wrote postcards to Christy informing her that he was at the park waiting for her to find him if she wished, but saying "At some point, I will either give up or come to Bridgewater," where Christy stayed during the work week. Sloan suspects that Christy notified the police upon receiving a postcard that revealed plaintiff's location. The police department that was to serve the restraining order

on plaintiff contacted Morales on July 3, and asked whether any other charges were pending, informing Morales that plaintiff was found to be approximately twenty miles from Christy's place of employment.

When he received the call from the Bridgewater police that they had found plaintiff to serve the restraining order on him, and that he was picked up about twenty miles from Christy's job, Morales testified that he was concerned because plaintiff came all the way from Canada after Carroll Christy told him the relationship was over and she did not want to see him; he also kept writing letters, and was constantly calling her including at her place of employment. (Morales Dep., p. 84.) These circumstances, coupled with the statement plaintiff gave Morales, led him to become "scared for her." (*Id.* at 78.)

Morales testified that he reviewed the stalking statute, N.J. Stat. Ann. § 20:12-10, and felt that plaintiff's conduct fell under its purview. Plaintiff had made "a lot of communications" with Christy and she was afraid of him, he had followed her from Canada to Millville, and then found out that plaintiff was camping out twenty miles from Christy's place of employment. (*Id.* at 79.) "This guy was trying to get Mrs. Christy." (*Id.*) In fact, Morales testified that he compared the harassment and stalking statutes and ultimately decided that plaintiff would be properly charged with stalking. (*Id.* at 86.)

Thus, at that time, Morales decided to charge plaintiff with stalking because he was afraid for Christy's well-being and wanted to protect her by putting plaintiff in jail.

He contacted a Superior Court judge who issued a warrant for plaintiff's arrest on a stalking charge and set bail at $25,000. Plaintiff was then arrested. That evening, Morales transported plaintiff from the Hunterdon County Jail (in the vicinity where he was arrested) to the Cumberland County Jail (in the vicinity of Millville). When Morales picked up the plaintiff, he explained that plaintiff followed Christy from Canada to Millville and then from Millville to Bridgewater and such following constituted "stalking" in his opinion. (Sloan Dep., 12/28/00, p. 137.) After Morales brought plaintiff to the Cumberland County Jail that evening, he had no further contact with plaintiff. (*Id.* at 159-60.)

The Court notes that plaintiff has illustrated that there are no genuine issues of material fact to be determined in this case by admitting his conduct. Recounting Christy's reaction to his calling her place of work, plaintiff testified:

> A. Oh, she said, Doug, you've gone too far, you've been harassing me all weekend and I'll call the police if you come down, I'll call the police and I won't be there. . . . And I finally said, I take back what I said about not holding a grudge.

(Sloan Dep., 11/28/00, p. 100, 103.) Beside her place of employment, plaintiff called others related to and affiliated with Christy, including her elderly mother; introducing himself as "Carroll Christy's Canadian lover."

> Q. . . . who else did you tell that you were Carroll Christy's Canadian lover, besides Matt Christy and Karolyn Kohn?

A. Her mother, Carroll Christy's mother, back on March the 23rd, I believe it was.
Q. We're still in '96?
A. Um-hum.
Q. That's a yes?
A. Yes.

(*Id.* at 129.) Plaintiff has further admitted to the conduct that precipitated Christy's complaint:

Q. Do you think you called her house a dozen or more times or a dozen or less times during the 21st and the 28th of March?
A. Between the 21st and the — let me see, I stopped calling her house on the 25th, actually.
Q. Okay, and between the 21st and 25th, approximately how many times did you call her?
A. It could have been a dozen. I spoke only to her answering machine in that time.

(Transcript, p. 25.)

Q. . . . can you tell me whether all of these events occurred prior to June 29th and I'd like to take them one at a time, okay? You were told by Carroll Christy that she no longer wanted to continue the relationship, that occurred before that date?
A. Yes.
Q. And you left messages on her answering machine, that occurred before June 29th?
A. For one weekend.
Q. My question is: Did it occur before June 29th?

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A. Yes.
Q. Okay. You called and spoke to her secretary Wilma, did that occur before June 29th?
A. Yes.
Q. And she got on the phone and said, Doug, you've gone too far, did that occur before June 29th? . . .
A. Yes.
Q. And she said, you've been harassing me all weekend, did that occur before June 29th?
A. Yes.
Q. And she said to you, if you come down I'll call the police and I won't be there, did that statement — was that statement made before June 29th?
A. Yes.
Q. Now, again prior to June 29th, did Carroll tell you that she didn't owe you an explanation for the breakup?
A. Yes, she did.
Q. And prior to June 29th did she tell you, I can't be in a relationship with someone who's in another sexual relationship? . . .
A. She did but I wasn't in another sexual relationship. . . .
Q. Okay. Did you say to her, Carroll, you're a cruel woman, prior to June 29th?
A. I believe so. . . .
Q. Okay. Did you say prior to June 29th, I take — to Carroll Christy, I take back what I said about not holding a grudge; did you say that?
A. I did.

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Q. And that was prior to June 29th?
A. Yes.
Q. Did you have your solicitor in Canada write to Carroll Christy prior to June 29th?
A. Yes.
Q. And did you instruct your solicitor to include all or a portion of the separation agreement that you had with your Canadian Carol prior to June 29th?
A. Yes.
Q. And pursuant to your testimony today, did you form a judgment that you better proceed very cautiously in coming to New Jersey in case she really meant no, did you form that judgment prior to June 29th?
A. I did and I did proceed cautiously.

(Sloan Dep. p. 166-69.) He rationalized his behavior:

A. I said, I have three choices, one of them is to speak to your relatives or friends, another is to camp on your front lawn and risk being arrested, and the third is to humiliate myself by going to the police and asking them to bring me over in chains.
Q. All of those statements were made prior to June 29th?
A. Yes.
Q. And to whom and how were they made?
A. Sir, those last three statements were made in a letter I wrote on June 29th.

Q. So all of the matters that I just discussed with you occurred prior to your coming to New Jersey?
A. Um-hum.
Q. Is that correct?
A. Yes.

(*Id.* at 170-71.)

Finally, the Court notes that in response to some of the frustrating testimony given by the plaintiff, the Chancery Division judge commented at the hearing.

> . . . when I got out of that other relationship, I felt I had a claim to write her again and ask her if —
> THE COURT: But sir, there came a point in time that she talked to you, or came a point in time that an officer talked to you, there came a point in time that a lawyer talked to you, there came a point in time that her brother-in-law talked to you. There were numerous messages sent that were not unclear. You testified to that.
> A. I want to hear it from her, sir.
> THE COURT: Okay. Thank you, sir, I've heard enough. This is a matter of Carol Christy versus Douglas Sloan. This is a charge under the Prevention of Domestic Violence Act. The charge is harassment. Harassment is under our Criminal Code, is 2C:33-4. The acts before this Court probably would also fall under Stalking, although Mr. Sloan is not charged with stalking in this court.

(Transcript, p. 40-41.)

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This Court finds that Morales was prudent and reasonable in determining that plaintiff engaged in a course of conduct directed at Carroll Christy that would have caused a reasonable person in her position to fear bodily injury to herself or a member of her immediate family. Plaintiff did repeatedly maintain a physical proximity to Christy by following her from his residence in Canada to her hometown of Millville to the area proximate to her employment in Bridgewater. Christy testified that she was both alarmed and annoyed. All of the evidence of record, even viewed most favorably to plaintiff, would not reasonably support a contrary finding under either version of the statute. Thus, because the plaintiff has failed to offer sufficient probative evidence from which a jury could reasonably find an absence of probable cause to arrest or prosecute him, the Court will grant defendant Morales' motion for summary judgment on plaintiff's malicious prosecution claim under common law and § 1983.

Similarly, the Court finds no evidence in the record that Carroll Christy initiated the proceedings against plaintiff with improper purpose. On the contrary, the record indicates that she sought protection for legitimate and substantiated reasons. Count One will be dismissed as against both of the individual defendants. Also, because this count contained no allegations against the municipal defendants, it will be considered dismissed in its entirety.

In addition, the Court will grant the motion for summary judgment in favor of defendant Morales on the alternative ground that he is qualifiedly immune from suit under § 1983. Qualified or "good faith" immunity is an affirmative defense

to § 1983 liability. *Seigert v. Gilley*, 500 U.S. 226 (1991). "[G]overnment officials performing discretionary functions generally are granted a qualified immunity and are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (internal quotation marks omitted). If the actions taken are those that a reasonable official could have believed lawful, dismissal on immunity grounds is warranted even if the defendant's conduct violated the plaintiff's constitutional rights. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the action was lawful]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Under this standard, qualified immunity protects all but the "plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 343.

The Third Circuit has adopted a two-pronged qualified immunity analysis. *Showers v. Spangler*, 182 F.3d 165, 171 (3d Cir. 1999). *But see Rouse v. Plantier*, 182 F.3d 192, 196-97 (3d Cir. 1999) (characterizing qualified immunity inquiry as three-part test). Under this approach, a court first must decide whether the defendant's conduct as alleged by the plaintiff violated clearly established law. *Showers*, 182 F.3d at 171. Second, a court must determine whether, in light of the Circumstances known to the defendant at the time, a reasonable official could have believed that the challenged

conduct was lawful. *Showers*, 182.F.3d at 171. Generally, the issue of qualified immunity is a question of law for a court to decide unless material issues of disputed fact exist precluding summary judgment. *Wilson*, 526 U.S. at 609.

In this case, it was well-settled at the time in question that the Fourth Amendment protects individuals from unreasonable seizures and that violations of the Fourth Amendment are governed by the objective reasonableness standard. The record shows, however, that Morales had an objectively reasonable belief in the lawfulness of his conduct in light of the circumstances known to him at the time in question. He has testified as follows:

> He [plaintiff] said, Can you sit down and read with me what can happen? No problem. So I basically brought him back to my office and read to him the harassment and stalking charges.
>
> He asked me, What do you think would be best? I said, your best bet if, you know, you didn't want to get in any trouble, your best bet was just try to leave the area. And I told him, not being smart, I said your best bet is just go back to your country. You probably don't want to be in the area if there's a problem.
>
> I believe after that I — I believe he turned around and told me would it be all right if he camped out in her yard. Well, he startled me. . . .

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After that, he just got up. I made copies for him. I made copies of the statement he gave me. I put that into evidence and he walked out.

And at that time I was concerned. It was like, you know, just weird somebody came in and asked me these questions. So I walked out to see where he went. He walked out to his car and he left. As he turned the corner, I got the registration of his vehicle, make and model of his vehicle. I didn't know — he's from Canada. I didn't know where he was going. . . .

I got, — I believe later on that evening, maybe an hour later, Blake Christy, who is Carroll's son, contacted me at the police department and was worried about his mother, her whereabouts, because nobody could get ahold of her, nobody could call her at the cell phone. I believe she was at work. I believe it was a Friday night so it would be the weekend. They were thinking maybe she was on her way home. Nobody knew where she was at.

Specifically I started to be concerned because she wasn't on her phone, wasn't at work. And at this time she lived out by herself on Hogbin Road . . . .

(Morales Dep., p. 16-18.) With this background, and after speaking with Christy, as discussed above, once plaintiff further traveled north to approximately twenty miles from

Christy's work, Morales was reasonable in believing that plaintiff's conduct fell under the stalking statute, which Morales did review prior to calling a judge to request a warrant. Thus, this Court finds Morales to be immune from the malicious prosecution claims under § 1983 and common law.

Count Two

To set forth a prima facie claim under § 1983, a plaintiff must show that a person, while acting under color of state law, caused a deprivation of the plaintiff's Constitutional rights. The "essence of section 1983's color of law requirement is that the alleged offender, in committing the act complained of, abused a power or position granted by the state." *Bonenberger v. Plymouth Township*, 132 F.3d 20, 24 (3d Cir. 1997). Thus, for an individual to be liable for the deprivation of a person's constitutional rights, he must "have exercised power possessed by virtue of state law and made possible only because . . . [he was] clothed with the authority of state law." *Abbott v. Latshaw*, 164 F.3d 141, 146 (3d Cir. 1998), *cert. denied sub nom., Gear v. Abbott*, 119 S. Ct. 2393 (1999) (*quoting West v. Atkins*, 487 U.S. 42, 49 (1988)).

A local government entity qualifies as a person under § 1983, but can be held liable only for injuries caused by its own deliberate actions and not for the constitutional torts of its employees. *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978). To prevent a municipality from being held liable "solely because it employs a tortfeasor," a plaintiff must demonstrate that a municipal "policy" or "custom" caused him to suffer a deprivation of a federally protected right. *Monell*, 436 U.S.

at 692. Only where a municipal policy or custom is the "moving force" behind the constitutional deprivation suffered by a plaintiff will municipal liability attach. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390-91 (1989); *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986) (stating that municipal liability will attach "where-and only where-a deliberate choice to follow a course of action is made from among various alternatives by the official[s] responsible for establishing final policy with respect to the subject matter in question").

Government "policy" is made when a legislative body or an official possessing final decision-making authority issues an official proclamation or directive. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir. 1990) (internal quotation marks omitted). Evidence of one isolated decision by such an authority will not alone constitute municipal policy unless that decision itself violated federal law, or directed or authorized the deprivation of federally protected rights. *Board of County Commissioners of Bryan County v. Brown* 520 U.S. 397 (1997). A government custom, on the other hand, may be established by proof that an unauthorized or informal practice or course of conduct "is so well settled and permanent as to constitute law." *Andrews*, 895 F.2d at 1480. Alternatively, custom may be established by evidence of knowledge and acquiescence. *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996). Thus, before municipal liability will attach, a plaintiff must demonstrate that a policymaker is responsible for the policy or, through acquiescence, for the custom which caused his constitutional injuries. *Andrews*, 895 F.2d at 1480; *Montgomery v. DeSimone*, 159 F.3d 120, 126 (3d Cir. 1998) (holding that

municipal liability under § 1983 will attach only where plaintiff can (i) identify challenged policy or custom, (ii) attribute policy or custom to municipality, and (iii) demonstrate that policy or custom caused plaintiff's injuries).

Because the record is devoid of any evidence that a City policy or custom was the moving force behind the constitutional deprivations allegedly suffered by the plaintiff, the. Court will grant summary judgment on the plaintiff's § 1983 claim against the City of Millville. Further, the City of Millville Police Department has no separate legal existence apart from the City itself and is therefore not a suable entity under § 1983. *PBA Local No. 38 v. Woodbridge Police Dept.*, 832 F. Supp. 808, 825-26 (D.N.J. 1993). Accordingly, plaintiffs § 1983 claims against the Police Department will also be dismissed.

Under certain circumstances a private defendant, such as Carroll Christy, may be deemed to have acted "under color of state law" within the meaning of 42 U.S.C. § 1983 where such private actor conspired with a public actor to violate a plaintiff's constitutional rights. *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). If the public actor in this case did not commit any unconstitutional action, however, the private defendant cannot be held accountable under such a conspiracy theory. Moreover, there is no evidence in the record that Christy was working in conjunction with Morales so as to come under the auspices of § 1983. Morales has testified to this effect:

> Q. When was it, if ever, that you discussed this stalking complaint with Carroll Christy?
> A. Never, that I remember. I never talked to her about stalking.

Q. And that was simply —
A. That was my decision, yes sir.

(Morales Dep., p. 120-21.) Because there is no indication that Carroll Christy could be found to have acted under color of State law, plaintiff's civil rights conspiracy claim against her will be dismissed.

To establish a First Amendment free speech claim under § 1983, a plaintiff must demonstrate that his speech qualified for First Amendment protection and was a substantial or motivating factor in the defendant's actions against him, or her. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). In the present case, the plaintiff's unsupported assertions that the defendants' actions violated his First Amendment rights do not create a genuine issue for trial. Plaintiff fails to point to specific facts, by affidavit or otherwise, from which a reasonable jury could find that the defendants' actions were motivated, at least in part, by the plaintiff's exercise of his free speech rights. The mere fact that their actions had the incidental effect of silencing the plaintiff is insufficient to establish a violation of free speech.

Additionally, it appears from the complaint that plaintiff may be attempting to maintain a claim under 42 U.S.C. § 1981. Section 1981 prohibits racial discrimination in the making and enforcement of contracts and property transactions: The text of § 1981 reads:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens. . . .

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981 (2001). Plaintiff has not alleged that he was discriminated against with respect to real or personal property or on the basis of his race in terms of enforcing a contract, either in the complaint or in his brief. Thus, his reliance on § 1981 is misplaced and fails to state a cause of action for malicious prosecution.

Regarding the allegations of conspiracy, 42 U.S.C. § 1985(3) provides:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . whereby another is injured in his person or his property, . . . the party so injured shall have an action for the recovery of damages occasioned by such injury . . . against one or more of the conspirators.

42 U.S.C. § 1985 (2001). In addition to there being no evidence that the defendants conspired to violate the plaintiff's rights, as discussed above, defendant Morales is entitled to immunity from this claim.

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Count Three

Finally, there has been no proof of any conduct on the part of any defendant that would tend to breathe life into the vague allegation that plaintiff's rights under the New Jersey Constitution were violated, especially in light of the fact that this Court has found no violation of the United States Constitution. The standard for summary judgment is clear, and plaintiff has not shown that this claim, or any other, can survive under that standard.

An appropriate Order will be entered.

s/ Joseph H. Rodriguez
JOSEPH H. RODRIGUEZ
U.S.D.J.

Dated: August 14th, 2001

APPENDIX D — CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State. . . . to the full and equal benefit of all laws and proceedings for the security of persons. . . . as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties. . . . of every kind, *and to no other*.

Appendix D

N.J.S.A. 2C:12-10 as it was before June 20, 1996 — stalking:

A person is guilty of stalking . . . if he purposely and repeatedly follows another person *and* engages in a course of conduct *or* makes a credible threat *with the intent of* annoying or placing that person in reasonable fear of death or bodily harm.

where

"Credible threat" means an explicit or implicit threat made with the intent and the apparent ability to carry out the threat, so as to cause the person who is the target of the threat to reasonably fear for that person's safety.

A 'course of conduct' means a knowing and willful course of conduct directed at a specific person, composed of a series of acts over a period of time, however short, evidencing a continuity of purpose which alarms that person and which serves no legitimate purpose. The course of conduct must be such as to cause a reasonable person to suffer emotional distress. Constitutionally protected activity is not included within the meaning of 'course of conduct.'

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N.J.S.A. 2C:12-10 as amended on June 20, 1996 — stalking:

a. As used in this act:

(1) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.

(2) "Repeatedly" means on two or more occasions.

(3) "Immediate family" means a spouse, parent, child, sibling or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

b. A person is guilty of stalking . . . if he:

(1) Purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family; and

(2) Knowingly, recklessly or negligently places the specific person in reasonable fear of bodily injury to himself or a member of his immediate family or in reasonable fear of the death of himself or a member of his immediate family.

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N.J.S.A. 2C:33-4 — harassment:

> [A] person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

Fed. R. Civ. P. 8(c):

> Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively ... estoppel, . . . res judicata . . . any other matter constituting an . . . affirmative defense.

L. Civ. Rule 56.1:

> On motions for summary judgment, each side shall furnish a statement which sets forth material facts as to which there exists or does not exist a genuine issue.